IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

Civ. No. B 069450
(Super. Ct. No. BC 052395)

CHURCH OF SCIENTOLOGY INTERNATIONAL,

Plaintiff-Respondent,

-vs-

GERALD ARMSTRONG,

Defendant-Appellant.

On Appeal From Superior Court Of The State of California
County of Los Angeles
The Honorable Ronald M. Sohigian

BRIEF FOR RESPONDENT

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INTRODUCTION

This appeal is from a preliminary injunction order entered by Los Angeles County Superior Court Judge Ronald M. Sohigian requiring defendant Gerald Armstrong to comply with certain terms of a written settlement agreement signed by Armstrong, while represented by counsel, pursuant to which Armstrong received approximately $800,000. The preliminary injunction order is narrow and specific: it prohibits Armstrong from "voluntarily assisting any person (not a governmental organ or entity) arbitrating or litigating a claim against the [plaintiff and certain other entities and individuals associated with plaintiff]", or voluntarily assisting any person "intending to make, -- press, . . . arbitrate, or . . . litigate" such a claim (1715).[1/] The injunctive order also contains several explicit exceptions, which make clear that Armstrong is free to testify as a witness, accept service of process, and report criminal conduct to proper authorities. *Id.*[2/]

In entering the preliminary injunction, Judge Sohigian made the requisite factual findings that the threatened acts which he enjoined "would do irreparable harm to plaintiff which could not be compensated by monetary damages" (1714); that such irreparable harm would outweigh any potential harm to Armstrong resulting from the

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1/ References to "__" are to pages in Appellant's Appendix in Lieu of Clerk's Transcript.

2/ The injunctive order states:

> The court does not intend by the foregoing to prohibit defendant Armstrong from: (a) being reasonably available for the service of subpoenas on him; (b) accepting service of subpoenas on him without physical resistance, obstructive tactics, or flight; (c) testifying fully and fairly in response to properly put questions either in deposition, at trial, or in other legal or arbitration proceedings; (d) properly reporting or disclosing to authorities criminal conduct of the persons referred to in sec. 1 of the "Mutual Release of All Claims and Settlement Agreement" of December, 1986; or (e) engaging in gainful employment rendering clerical or paralegal services not contrary to the terms and conditions of this order.

injunction (*id.*); that the limited injunction "will preserve the status quo pending trial" (*id.*); and, most significantly, that "There is a reasonable probability that plaintiff will prevail after trial of this case in the respects restrained by this order." *Id.* Indeed, Judge Sohigian explicitly noted the issues raised by the controversy (1716), and found that plaintiff was likely to prevail on its claims of the existence of a contract, the lack of duress, and the legality of terms of the settlement agreement pursuant to which defendant agreed "not to assert or exercise rights which [he] might otherwise have." *Id.*

As we show, the factual record and the applicable legal principles virtually compelled the Superior Court's holding. Armstrong knowingly entered into a settlement agreement with the assistance of counsel, accepted a substantial amount of money, and made no effort to rescind the contract or return his part of the bargain. Yet he openly acknowledged his violation of the agreement and consistently stated that he would continue to do so.

Respect for the principles of contract and of the important public policy favoring settlement of litigation (and, concomitantly, enforcement of settlement agreements) left the Superior Court with little choice than to preliminarily enjoin Armstrong's ongoing behavior. At the least, its decision to do so, *pendente lite*, can by no stretch of the imagination be deemed an abuse of discretion.

STATEMENT OF THE CASE

Proceedings Below

Plaintiff Church of Scientology International filed its complaint on February 4, 1992, seeking damages and injunctive relief. Plaintiff alleged that it, and other entities and individuals associated with it and the Scientology religion (hereinafter collectively

referred to as "the Church"), had entered into a settlement agreement with defendant Armstrong on December 6, 1986, settling and disposing of litigation claims of Armstrong and providing Armstrong with substantial compensation. The complaint alleged that the settlement agreement contained a number of additional terms, the most significant of which required Armstrong to refrain from voluntarily aiding others in litigation against the Church, to return to the Church certain private documents that Armstrong had taken from the Church, to refrain from discussing with third parties his experiences with Scientology, and to keep confidential the terms of the Agreement itself.[3/]

The complaint went on to allege that beginning in June 1991 and continuing until the institution of the present lawsuit, Armstrong openly had entered upon a course of action in derogation of his duties and obligations under the settlement agreement by voluntarily providing aid and assistance to the Church's litigation adversaries, including performing paralegal services for the opposing attorneys in such litigation, providing declarations which purport to describe Armstrong's experiences with Scientology, and submitting copies of documents that Armstrong agreed to keep confidential, including copies of the settlement agreement itself.

Concurrently with filing its complaint, plaintiff sought a preliminary injunction against further continuing violations of the settlement agreement. Plaintiff submitted declarations and exhibits documenting Armstrong's violations and his threats to commit further violations.

[3/] The Agreement also provided for the sealing of the Superior Court file. A challenge to the sealing order was rejected by this Court in *Church of Scientology of California* v. *Armstrong* (1991) 232 Cal.App.3d 1060, 283 Cal.Rptr. 917.

In opposing the motion, Armstrong did not deny the acts alleged, but rather sought to renounce the applicable portions of the settlement agreement (but not, of course, the portions favorable to him). Armstrong argued, as he does on this appeal, that the settlement agreement violates his right to freedom of speech and is contrary to public policy, that it is invalid for purported lack of mutuality of obligation, and that he is not bound by it because he allegedly signed it under duress. In response to the latter assertion, the Church submitted declarations and a videotape of the meeting at which Armstrong signed the settlement agreement in the presence of his counsel, demonstrating the non-coercive and voluntary nature of the agreement.

After extensive proceedings and oral argument before the Superior Court, the Superior Court issued its order on May 28, 1992, preliminarily enjoining Armstrong from *voluntarily* assisting any person (other than a governmental entity) litigating or arbitrating, or intending to make, press, litigate or arbitrate a civil claim against the Church. The Superior Court stated (1716):

> The restraints referred to in sec. 6, above, properly balance and accommodate the policies inherent in: (a) the protectable interests of the parties to this suit; (b) the protectable interests of the public at large; (c) the goal of attaining full and impartial justice through legitimate and properly informed civil and criminal judicial proceedings and arbitrations; (d) the gravity of interest involved in what the record demonstrates defendant might communicate in derogation of the contractual language; and (e) the reasonable interpretation of the "Mutual Release of All Claims and Settlement Agreement" of December, 1986. The fair interpretation of all the cases cited by the parties indicates that this is the correct decisional process. The law appropriately favors settlement agreements. Obviously, one limitation on freedom of contract is "public policy"; in determining what the scope of the public policy limitation on the parties' rights to enforcement of their agreement in the specific factual context of this case, the court has weighed the factors referred to in the first sentence of this section. Litigants have a substantial range of contractual

> freedom, even to the extent of agreeing not to assert or exercise rights which they might otherwise have. The instant record shows that plaintiff was substantially compensated as an aspect of the agreement, and does not persuasively support defendant's claim of duress or that the issues involved in this preliminary injunction proceeding were precluded by any prior decision.
>
> Armstrong then filed this appeal.

Statement of Relevant[4/] Facts

On December 6, 1986, the Church entered into a settlement agreement with Armstrong (072), as well as a number of other persons involved in litigation against the Church (089).

At the time, the Church and Armstrong were engaged in a bitter litigation arising out of Armstrong's involvement as a staff member of the Church, and out of his actions in taking from the Church, without authorization, as many as 15,000 pages of original and copied confidential documents (1511-12). The documents included such items as the personal diaries and journals of L. Ron Hubbard, the founder of the Scientology religion, and correspondence between Mr. Hubbard and his family, friends and associates (1527). The Church of Scientology of California and Mary Sue Hubbard, Mr. Hubbard's wife, had sued Armstrong for return of the documents and for damages for conversion, breach of fiduciary duty and confidence, and invasion of privacy (1511-12); Armstrong had cross-

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[4/] Almost all of Armstrong's statement of "facts" concerns allegations, purported events, and claims entirely unrelated to the narrow issues involved in this appeal, such as Armstrong's obviously prejudiced views about L. Ron Hubbard, his false and distorted claims about a non-existent "fair game" policy and the RPF, and his wholly negative attitudes and claims about Scientology practices.

This case involves a settlement agreement which Armstrong admittedly signed, pursuant to which he admittedly received nearly one million dollars, and which he freely concedes to have breached. No other facts are relevant, and we decline Armstrong's attempt to litigate here issues and claims not part of this case.

claimed for damages for, *inter alia*, fraud and emotional distress arising out of his long-term involvement with the Church (1388).[5/]

The settlement agreement settled all Armstrong's cross-claims. With respect to the Church's claims, Armstrong agreed to the return to the Church of all originals and copies of the documents. The Church's damage claims against Armstrong, which were the subject of a pending appeal, were not settled (75), but, in a series of separate agreements, executed concurrently, were in effect limited to a claim for nominal damages.[6/]

Under the terms of the settlement agreement, Armstrong received an amount of money, which was to be determined between himself, his counsel and counsel for the other litigants who were also settling their disputes with the Church. The amounts of the settlements were to be kept confidential (74). Subsequent disclosures by Armstrong revealed that he received $800,000 (109, 113).

Because prior to the settlement Armstrong had engaged in vitriolic public attacks on the Church and had, in the Church's view, stirred up unwarranted litigation against the Church by others, a primary incentive for the Church in making a settlement was

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[5/] At the time of the settlement agreement, Armstrong had submitted the documents under seal to the Superior Court clerk, pursuant to order of that court. The Church's claims, which had been severed from the cross-claims, had been tried before Judge Breckenridge in May 1984. In a decision dated June 20, 1984 (467), Judge Breckenridge had found that the Church had proven a prima facie case in support of each of its claims, but nevertheless ruled in favor of Armstrong on the basis of a novel justification defense based on Armstrong's subjective state of mind. The Church's appeal from Judge Breckenridge's decision was pending at the time of the settlement agreement. Armstrong's cross-claims remained to be tried.

[6/] Incredibly, Armstrong now argues that his attorney did not inform him of these separate agreements, and that he somehow was defrauded by them. Even in the highly unlikely event that Armstrong's attorney did not inform him of these agreements, Armstrong has no cause to complain, since the agreements inured entirely to *his* benefit.

to obtain Armstrong's agreement not to continue to publish or discuss matters relating to the Church, to maintain confidentiality with respect to his experiences with the Church, and to refrain from voluntarily assisting others in litigation against the Church (78). During the settlement negotiations, the parties specifically discussed these important non-disclosure provisions (91). The Church parties explained at that time that the settlement agreement could not contain mutual non-disclosure provisions in view of the fact that, although Armstrong's receipt of the settlement payment terminated all issues for him, the Church might subsequently face problems as a result of the prior declarations and statements Armstrong had made (91). Since the Church considered Armstrong's prior statements to be false and defamatory, the Church necessarily required the freedom in the future to communicate about the various false statements Armstrong had made. (92).[7/]

Armstrong entered the agreement freely and knowingly without threat, intimidation, or pressure after sufficient investigation and receipt of counsel's advice (84, 86). He specifically acknowledged that: (1) his attorney had explained the legal and factual ramifications of the settlement agreement, (2) he knew it was a block settlement involving all of his attorney's clients who were litigating against the Church, (3) he had read and understood the agreement and knew what he was signing, and (4) there was no duress or coercion involved in his execution of the settlement (91). A videotape memorialized the signing of the agreement, which was attended by Armstrong, his counsel, counsel for CSI, an officer of CSI, and a notary public (97-108).

[7/] Armstrong now complains that the Church retained the right to attempt to counteract the false light in which his statements have placed the Church, including the right to provide evidence to impeach his credibility. Armstrong, however, understood at the time he signed the agreement the church's requirements in this regard.

Notwithstanding Armstrong's agreements to refrain from aiding litigants against the Church, despite his promises of non-disclosure and non-discussion, and regardless of his covenant not to give evidence gratuitously, Armstrong has proceeded to involve himself in litigation against the Church and has voluntarily and gratuitously provided evidence in proceedings against the Church (125-128, 143-144, 169-170, 182-183).

Armstrong's direct involvement in litigation against the Church occurred, for example, when he took a position working for Joseph Yanny, an attorney who was representing two former Church members, Richard and Vicki Aznaran, in a $70 million lawsuit they had filed in federal court against the Church and related entities (123, 125-128). Armstrong went out of his way to participate in the litigation by agreeing to travel to Los Angeles for the purpose of helping Yanny and the Aznarans (127). He requested that he be paid for his services (127), and he admitted that he voluntarily wrote a declaration for Yanny and the Aznarans (128). Yanny also admitted that he hired Armstrong specifically for the purpose of conducting litigation against the Church (123).[8/] In assisting Yanny and the Aznarans, Armstrong knowingly violated Paragraphs 10 and 7(G) of the settlement agreement (81, 84).

The federal court on its own motion eventually disqualified Yanny as counsel for the Aznarans since Yanny had for several years previously served as general counsel for the Church.[9/] After the federal court prevented Yanny from becoming counsel of record,

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[8/] Yanny had substituted into the Aznaran litigation to replace Ford Greene, but the federal court *sua sponte* precluded Yanny's attempts to substitute in as counsel for the Aznarans. The Aznarans then, once again, retained Ford Greene as their attorney.

[9/] The Church eventually sued Yanny for his breach of fiduciary duties in representing parties adverse to his former client. Armstrong provided assistance and declarations for (continued...)

Armstrong moved from Yanny's employ and gave his assistance to Ford Greene, making it clear that Armstrong's intent was to involve himself in litigation against the Church, as opposed merely to finding employment in a law office. In a letter dated August 21, 1991, Armstrong admitted that he was working in Greene's office and performed such tasks as giving assistance to Greene in preparing responses to a summary judgment motion in the Aznaran litigation (143-144). Armstrong has also provided declarations to be used as evidence in favor of the Aznarans in their lawsuit against the Church (147-151). Armstrong has apparently continuously worked with Greene since that first association on the *Aznaran* case (169-170).

In a declaration of November 1991, Armstrong took the aggressive position that he had never had the intention of abiding by the settlement agreement. He stated that he read and understood the import of the provisions of the settlement agreement at the time he signed the agreement, but he raised the rather inexplicable excuse that he had told his own lawyers, at the time of settlement, that he had no intention of adhering to the agreement (1389-1393).

Armstrong also seeks to divert attention from his own violations of the settlement agreement by claiming that the Church has breached provisions of the settlement agreement by publishing or distributing statements about him. As discussed above, however, the settlement agreement does not prohibit the Church from distributing information for the purpose of correcting false impressions that have been created by Armstrong. These arguments, too, were rejected by the Superior Court.

[9/](...continued)
Yanny in that suit, as well, in violation of paragraphs 10 and 7(G) of the settlement agreement.

ARGUMENT

I. The Trial Court Applied the Correct Legal Standards For Issuing a Preliminary Injunction, And Its Decision to Issue the Limited Preliminary Injunction Was Not an Abuse of Discretion

A preliminary injunction is, by its nature, temporary in purpose and effect and seeks to preserve the status quo until final judgment. *Continental Baking Co.* v. *Katz* (1968) 68 Cal. 2d 512, 528, 67 Cal.Rptr. 761, 771. In determining whether to issue a preliminary injunction, the trial court is required to consider two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the irreparable harm plaintiff is likely to suffer if the injunction is denied weighed against any interim injury the defendant may suffer if it is granted. *Robbins* v. *Superior Court* (1985) 38 Cal.3d 199, 205, 211 Cal. Rptr. 398, 402.

Both because of the temporary nature of a preliminary injunction and the sensitive and delicate nature of the balancing required in determining whether or not one should issue, a trial court's determination to grant or deny a preliminary injunction is accorded great deference. An appeals court looks only to whether the trial court abused its discretion in deciding the likelihood the plaintiff will prevail on the merits and in balancing the harms that would be suffered by each party. *See*, *Cohen* v. *Board of Supervisors* (1985) 40 Cal. 3d 277, 286-87, 219 Cal. Rptr. 467-471-72. The appeals court, accordingly, does not substitute its own judgment either on the likelihood of success on the merits or the balancing of equities; only the clearest and most manifest error of law or failure to consider relative hardships will justify reversal. *Id.* And in reviewing factual determinations of the Superior Court, even where the Superior Court made such determinations on the basis of affidavits, the appeals court will not disturb the Superior

Court's findings unless they "exceeded the bounds of reason" or are directly contrary to "uncontradicted evidence." *Continental Baking Co.* v. *Katz*, 67 Cal. Rptr. at 770, quoting *Estate of Parker* (1921) 186 Cal. 668, 670, 200 P. 619, 620.

The trial court's ruling in this case demonstrates the careful attention with which Judge Sohigian approached his task. The trial court emphasized that the "law appropriately favors settlement agreements" (1716), and that "litigators have a substantial range of contractual freedom, even to the extent of agreeing not to assert or exercise rights which they might otherwise have." *Id.* On the other hand, the court took cognizance of "public policy" limitations on the freedom of contract, in particular that private parties may not make agreements which would undermine "the goal of attaining full and impartial justice through legitimate and properly informed civil and criminal judicial proceedings and arbitration." *Id.* Accordingly, the trial court narrowly tailored its order to prohibit precisely those acts which Armstrong repeatedly had committed in violation of the agreement and for which the trial court found there was no adequate legal remedy, while excluding from the scope of the injunction acts which might be necessary for the proper functioning of the judicial system. Thus, Armstrong was prohibited from *voluntarily* assisting any litigant or potential litigant against the Church, *excluding* a government entity or organ. He explicitly is permitted to be "reasonably available for the service of subpoenas upon him," to accept service of subpoenas without resistance, to testify, and to report criminal conduct to proper authorities.

The trial court also considered and rejected, on the basis of the record, Armstrong's "claim of duress," and noted that Armstrong "was substantially compensated as an aspect of the agreement." *Id.*

Accordingly, the conclusion is ineluctable that the Superior Court committed no abuse of discretion in granting the injunction. The Church submitted detailed factual showings of Armstrong's intentional breaches and express violations of the settlement agreement. The Church's evidence was borne out not only by Armstrong's conduct but also by his own statements regarding his intentions. In view of the evidence, the trial judge was completely justified in concluding that the Church was likely to prevail on the merits. Where a party seeks to enforce a negative covenant, such as a promise not to do a particular thing, the appropriate remedy is an injunction restraining the defendant from its violation of the covenant. *See*, 6 Witkin, *California Procedure*, Provisional Remedies, § 263, p. 225 (3d ed. 1985).

In addition, the Church showed that it would suffer interim harm and irreparable injury if the Court failed to issue the injunction. Armstrong continuously engages in conduct detrimental to the Church by voluntarily assisting adversaries of the Church in pursuing litigation. On the other hand, imposition of the injunction fails to create any hardship or injury for Armstrong, aside from being unable to continue to violate the agreement.

In view of the compelling evidence showing Armstrong's repeated and ongoing violations of the settlement agreement, analysis of the likelihood of prevailing on the merits and the balancing of the equities clearly demonstrates the trial court's appropriate exercise of discretion in entering the preliminary injunction.

II. The Trial Court Did Not Abuse Its Discretion In Finding That Plaintiff Was Likely to Prevail on the Merits of Its Claim That Armstrong Was Continuing to Violate a Valid Settlement Agreement

Defendant does not seriously contest that he had violated and continues to violate the settlement agreement by providing aid and assistance to non-governmental litigation opponents and potential litigation opponents of the Church. Instead, he has argued that the settlement agreement should not be enforced for a variety of reasons, including, *inter alia*, that the settlement agreement violates public policy, that it violates Armstrong's first amendment rights, and that Armstrong signed the agreement under duress. The Superior Court considered and properly rejected all these contentions as insubstantial.

A. The Important Public Policy In Favor of Settlement of Litigation Creates a Strong Presumption in Favor of Their Validity, and Requires That Settlement Agreements Be Construed To Render Them Valid

It is widely recognized that "[p]ublic policy supports both pretrial settlement of lawsuits and enforcement of judicially supervised settlements." *Phelps* v. *Kozakar* (1983) 146 Cal. App. 3d 1078, 1082, 194 Cal.Rptr. 872, 874. *Accord*, *Fisher* v. *Superior Court* (1980) 103 Cal.App. 3d 434, 437, 440-41, 163 Cal. Rptr. 47, 49, 52; *Ford* v. *State* (1981) 116 Cal. App. 3d 507, 517-518, 172 Cal. Rptr. 162, 167-68. Indeed, this important public policy predates the modern explosive expansion of litigation. It long has been stated that settlement agreements "are highly favored as productive of peace and goodwill in the community, and reducing the expense and persistency of litigation." *McClure* v. *McClure* (1893) 100 Cal. 339, 343, 34 P. 822, 824. See *Potter* v. *Pacific Coast Lumber Co.* (1951) 37 Cal. 2d 592, 602, 234 P.2d 16.

Similarly strong policies supporting settlement of disputes and enforcement of settlement agreements are followed in other jurisdictions and in the federal courts, whose holdings and observations thus are equally pertinent here. For example, in *Pennwalt Corp.* v. *Plough, Inc.*, 676 F.2d 77 (3d Cir. 1982), *cited with approval in TNT Marketing* v. *Agresti*, 796 F.2d 276, 278 (9th Cir. 1986), the Third Circuit reversed a district court's denial of a motion for a preliminary injunction sought to enforce provisions of a settlement agreement. The court noted the strong judicial policy in favor of settlements:

> Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should. When the effort is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial and the preparation and proceedings that must forerun it.

Pennwalt Corp., 676 F.2d at 80, *quoting Autera* v. *Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969). The Ninth Circuit fully concurs in this policy and has countenanced the summary enforcement of settlement agreements in circumstances such as here, where one party to an agreement has not observed its side of the bargain. *Matter of Springpark Associates*, 623 F.2d 1377 (9th Cir.), *cert. denied*, 449 U.S. 956 (1980):

> . . . a litigant can no more repudiate a compromise agreement than he could disown any other binding contractual relationship. . . . Moreover, it is equally well settled in the usual litigation context that courts have inherent power summarily to enforce a settlement agreement with respect to an action pending before it; the actual merits of the controversy become inconsequential. . . .

623 F.2d at 1380, *quoting Dacanay* v. *Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978).

The importance of adhering to the terms of a settlement agreement was emphasized by the district court in *In re Franklin National Bank Securities Litigation*, 92

F.R.D. 468 (E.D.N.Y. 1981), *aff'd. sub nom.*, *Federal Deposit insurance Corp.* v. *Ernst & Ernst* 677 F.2d 230 (2d Cir. 1982):

> The settlement agreement resulted in the payment of substantial amounts of money and induced substantial changes of position by many parties in reliance on the condition of secrecy. For the court to induce such acts and then to decline to support the parties in their reliance would work an injustice on these litigants and make future settlements. . . less likely.

92 F.R.D. at 472. In affirming, the Second Circuit held that "once a confidentiality order has been entered and relied upon, it can only be modified if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification." 677 F.2d at 232.

Similarly, in *Federal Leasing* v. *Underwriters at Lloyd's*, 650 F.2d 495, 499-501 (4th Cir. 1981), the Fourth Circuit affirmed a district court's grant of a preliminary injunction sought to enforce provisions of a settlement agreement. Notably, the Fourth Circuit pointed out that where risk to good will is asserted as an element of the irreparable injury, such injury is a sufficient basis for a preliminary injunction, for such damage is "incalculable -- not incalculably great or small, just incalculable." *Federal Leasing*, 650 F.2d at 500, *quoting Blackwelder Furniture Co.* v. *Seiling Manufacturing Co.*, 550 F.2d 189, 197 (4th Cir. 1977). So too, here.

For these reasons, it has long been the law that settlement agreements should be construed to render them valid, and, as so construed, should be enforced:

> The power to invalidate agreements on the ground of public policy is so far-reaching and so easily abused that it should be called into action only in cases where the dangerous tendency *clearly and unequivocally appears from the contract itself.* Courts are reluctant, therefore, to declare a contract void as against public policy, and *will refuse to do so if by any reasonable construction if may be upheld.*

Maryland Casualty Co. v. *Fidelity & Casualty Co. of New York* (1925) 71 Cal.App. 492, 497, 236 P. 210 (1925) (emphasis added). *Accord*, *Moran* v. *Harris* (1982) 131 Cal. App.3d 913, 919-920, 182 Cal.Rptr. 519, 522. Furthermore, the "burden is on the defendant to show that its enforcement would be in violation of the settled public policy of [California]." 182 Cal.Rptr. at 523. In addition, courts may not "encroach upon the lawmaking branch of government in the guise of public policy unless the challenged transaction is contrary to a statute or some well-established rule of law." *Id.* As we show in the following pages, Armstrong clearly has not carried his burden to show that the provisions of the agreement enforced by the Superior Court was "clearly and unequivocally" contrary to public policy.

B. The Superior Court Did Not Abuse Its Discretion in Finding That Preliminary Limited Enforcement of the Settlement Provision Prohibiting Armstrong From Assisting Actual or Potential Adverse Litigants Would Not Violate Public Policy or Result in Suppression of Evidence

The Superior Court's preliminary injunction prohibits Armstrong from voluntarily assisting potential or actual adverse litigants of the Church. It allows assistance to government entities, and it permits Armstrong to accept subpoenas without taking evasive action and to testify pursuant to subpoena.

Armstrong argues that, as enforced, the settlement agreement violates public policy because it suppresses evidence. It does no such thing. Armstrong remains as free -- indeed, as *obligated* -- as anyone else to accept and respond to subpoenas calling for his testimony. He remains as free -- and obligated -- as anyone else to report criminal activity or to cooperate with government entities. He simply may not do what he has been doing contrary to his settlement agreement -- voluntarily working to assist other litigants against the Church. Indeed, the evidence demonstrates that Armstrong has made a career -- if not

an obsessive crusade -- out of such activity. This is precisely what the Church paid him not to do pursuant to Section 7G of the settlement agreement (081).

Contrary to appellant's arguments, public policy favors enforcement of the settlement agreement. "Public policy supports both pretrial settlement of lawsuits and enforcement of judicially supervised settlements." *Phelps* v. *Kozakan* (1983) 146 Cal. App. 3d 1078, 1082, 194 Cal. Rptr. 872, 874. See discussion, *ante* at 13-16. It is settled law in California, as everywhere else, that the consideration for a contract "may be forbearance to sue on a claim, extension of time, or any other giving up of a legal right." 1 Witkin, *Summary of California Law* (9th Ed. 1987), Contracts § 214 at 223. *Accord, e.g., Louisville Title Insurance Co.* v. *Surety Title Guarantee Co.* (1962) 60 Cal. App.3d 781, 793, 132 Cal. Rptr. 273. The confidentiality and non-assistance provisions thus are entirely proper. These provisions merely prohibit Armstrong from acting *voluntarily*; they recognize Armstrong's legal obligation to testify when "compelled to do so by lawful process." The provisions merely establish a contract not to do what Armstrong could *choose* not to do prior to entering into the contract. Since Armstrong had the legal right *prior* to entering into the agreements to maintain confidentiality and to refrain from voluntarily assisting others engaged in proceedings adverse to the Church, Armstrong's argument that he could not contract to refrain from such conduct in the future is frivolous.

In addition, Armstrong's contention was recently rejected both by a California appellate court and a district court applying California law. *Philippine Export and Foreign Loan Guarantee Corp.* v. *Chuidian* (1990) 218 Cal. App.3d 1058, 267 Cal. Rptr. 457, *review denied*), 1990 Cal. Lexis 2305; *Chuidian* v. *Philippine National Bank*, 734 F.Supp. 415 (C.D. Cal. 1990). In *Philippine Export*, a party claimed that an agreement was illegal because it

purportedly required him to lie or to suppress evidence, and because it allegedly had been procured by fraud and duress. The California appellate court concluded, as a matter of law, that an agreement requiring confidentiality did not amount to suppression of evidence and did not contain an illegal term. *Id.* at 469. The court distinguished the California cases involving agreements containing a warranty of silence or to suppress evidence in an ongoing litigation or administrative proceeding, and concluded:

> The agreement to keep the settlement private was not an agreement to suppress evidence and was not illegal. Our experience with litigation in the Silicon Valley is that such agreements are routine here. Chuidian's agreement to turn over his copies of his deposition . . . is similarly not shown as a matter of law to be an act which has a tendency to suppress evidence. . . . Chuidian's agreement did not suppress nor withhold evidence from the court or from any party to the lawsuit. Accordingly, we hold that the consideration for the settlement was not illegal as a matter of law.

Id.

In the second case, *Chuidian* v. *Philippine National Bank*, the federal district court evaluated the same provision under California law and held that, unless a party is obligated by law to disclose the information, he is free to bargain away his right to disclose that information.

> Many lawsuits are settled for the sole purpose of avoiding the public disclosure of embarrassing or private information. Such is not illegal because it does not call for the suppression of evidence at a trial or proceeding, but rather is merely a motive behind settling the dispute.

734 F.Supp. at 424.[10/]

[10/] Many federal judges appear to regard as self-evident that confidentiality in settlements is necessary. There are frequent references to sealings of settlement agreements without comment in reported cases. *E.g.*, *Marine Midland Bank, N.A.* v. *Kilbane*, 739 F.2d. (continued...)

The provisions of the settlement agreement at issue here are similar to provisions upheld in other cases. In *Hoffman* v. *United Telecommunications, Inc.*, 687 F.Supp. 1512 (D. Kan. 1988), for example, the court approved a confidential settlement agreement between a defendant-employer and plaintiff-employee in an employment discrimination case. The settlement prohibited the employee or her counsel from any further participation in the case, except that the employee could testify pursuant to subpoena. The Equal Employment Opportunity Commission (EEOC) moved to have the agreement declared unenforceable as against public policy. The court denied the motion, finding that the "[p]laintiff's interest in recovering monetary compensation in a private settlement . . . outweighs, under the circumstances of this case, any harm to the public policy that encourages cooperation in an investigation of the subject employer." 687 F.Supp. at 1514. Significantly, the court stated, "Not the least justification of this holding is plaintiff's availability to testify completely and truthfully upon being subpoenaed by the EEOC." *Id.*

Here, of course, as in *Hoffman*, the agreements (and the preliminary injunction order) explicitly recognize Armstrong's obligation to testify in response to lawful process. In addition, the preliminary injunction here, unlike the agreement in *Hoffman*, permits Armstrong to assist government entities with ongoing law enforcement

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[10]/(...continued)
958, 959 (4th Cir. 1984); *Owen* v. *United States*, 713 F.2d 1461, 1462 (9th Cir. 1983); *E.E.O.C.* v. *Strasburger, Price, Kelton, Martin and Unis*, 626 F.2d 1272, 1274 (5th Cir. 1980).

One legitimate motivation for this confidentiality is to prevent one of the settling parties from disclosing information to other litigants against the other settling party. *See* Comments of Edward A. Dauer, Associate Dean of Yale Law School, to Second Circuit Judicial Conference, 101 F.R.D. 161, 233 (Sept. 30, 1981).

responsibilities, such as the EEOC. Thus, the balance in favor of the settlements the parties reached here is even stronger than it was in *Hoffman*.

In *In re Franklin National Bank Securities Litigation*, 92 F.R.D. 468 (E.D.N.Y. 1981), *aff'd sub nom*, *Federal Deposit Insurance Corp.* v. *Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982), a confidentiality order -- insisted on by one party -- was a critical factor in the settlement of the case. Two years after the case was settled, a nonparty moved in court for modification of the confidentiality order. The district court held that the "strong public policy favoring settlements of disputes" and "the importance of the stability of judgments and settlements, argue strongly against modification of the order." 92 F.R.D. at 472.

Wakefield v. *Church of Scientology of California*, 938 F.2d 1226 (11th Cir. 1991), involved an enforcement of a settlement agreement virtually identical to the agreement at issue here. As recounted in the Court of Appeals opinion:

> Wakefield publicly violated the settlement agreement's confidentiality provisions.
>
> In 1987, both the Church and Wakefield filed motions to enforce the settlement agreement. . . . On September 9, 1988, the magistrate judge issued a report and recommendation which concluded that Wakefield had violated the settlement agreement, and the Church had fully complied with [it]. . . . On May 16, 1989, the district court adopted the magistrate judge's report [and] issued a preliminary and permanent injunction against Wakefiled.

938 F.2d at 1227.[11/]

None of the cases relied on by Armstrong supports his argument. In *Allen* v. *Jordanos' Inc.*, (1975) 52 Cal. App.3d 160, 125 Cal. Rptr. 31, the California court held void a contract between an employer and employee in which the employer agreed to allow the

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[11/] The Court of Appeals opinion did not deal with the merits of the injunction issue, but did note "Wakefield's constant disregard and misuse of the judicial process. . ." *Id*. at 1230.

employee to obtain unemployment benefits -- benefits to which he was not entitled under state statute -- by maintaining silence as to the real reasons for the employee's dismissal. Since the settlement agreement in *Allen* worked a fraud on a state agency, of course the court held it invalid. No such effect was sought or achieved by the agreement here and Armstrong's suggestion that the agreements sought this effect is disingenuous. In *Brown* v. *Freese*, (1938) 28 Cal. App.2d 608, 618, 83 P.2d 82, the court held *valid* a provision which one party argued required confidentiality, but refused specific performance of the provision because it was too uncertain.[12/]

Mary R. v. *B. & R. Corp.* (1983) 149 Cal. App.3d 308, 316, 196 Cal. Rptr. 871, 875, provides no support for the Armstrong's position. In that case, the court considered the balance which should be struck where a nonparty sought to collaterally attack the validity of a sealing order made pursuant to settlement. In *Mary R.*, the underlying suit involved allegations of sexual molestation by a physician of a fourteen-year-old patient. The suit was settled, allegedly for financial consideration paid by the physician. The court ordered the court file sealed as part of the settlement. After the settlement, the state Division of Medical Quality moved to intervene to unseal the records in order to fulfill its statutory duty to supervise the practice of medicine in the state. The trial court denied the motion to unseal. The appellate court remanded for reconsideration of the balance of

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12/ Armstrong relies upon the Restatement (First) of Contracts § 557, which prohibited an agreement not to disclose discreditable facts. Appellant's Br. at 44. Armstrong fails to acknowledge that in the Restatement (Second) of Contracts, § 557 was omitted. *See* Restatement (Second) of Contracts, Ch. 8, Topic 1, Reporter's Note to Introductory Note. Instead, Restatement (Second) of Contracts § 178 now provides that a term of an agreement "is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such term." Clearly, Restatement (Second) of Contracts § 178 is not applicable here.

factors to determine whether the sealing order should be upheld. Central to the *Mary R.* court's decision was the fact that the sealing order prevented the Division of Medical Quality from carrying out is *statutory obligations* to discipline misconduct of physicians. 149 Cal. App.3d at 315, 196 Cal. Rptr. at 875. No similar statutory duty exists in this case. Indeed, the preliminary injunction explicitly permits Armstrong to assist government entities and to report criminal acts.

In *Eggleston* v. *Pantages*, 103 Wash. 458, 460, 175 P. 34 (1918), the court held that an agreement not to file an action for the appointment of a receiver after the action had already been "instituted" obstructed "justice for the purpose of wronging others interested." Thus, *Eggleston*, involved an agreement not to take action when inaction would have direct adverse effects on the rights of others having an interest in an ongoing case in which the settlor was a party.

As we have shown, California courts do not indiscriminately invoke public policy to refuse to enforce any contract which, in other circumstances, might arguably contravene public policy. "Courts are reluctant, therefore, to declare a contract void as against public policy,and *will refuse to do so if by any reasonable construction it may be upheld.*" *Maryland Casualty Co.* v. *Fidelity & Casualty Co. of New York*, (1925) 71 Cal. App. 492, 497, 236 P. 210. Armstrong clearly has not carried his burden to show that the relevant term of the settlement agreement, at issue here, as construed and preliminarily applied by the Superior Court, was "clearly and unequivocally" contrary to public policy at the time the agreement was made. *Moran* v. *Harris*, (1982) 131 Cal. App.3d 913, 919-920, 182 Cal. Rptr. 519, 522, *quoting Stephens* v. *Southern Pacific Co.* (1895), 109 Cal. 86, 89-90, 41 P. 783.

C. The Superior Court Did Not Abuse Its Discretion In Finding That Armstrong Is Not Likely to Prevail on His Assertion that the Settlement Agreement, as Preliminarily Enforced, Violates His First Amendment and Other Constitutional Rights.

Appellant devotes many pages of his brief to a First Amendment and equal protection attack on the settlement agreement and the preliminary injunction. While appellant cites many cases concerning the general scope of constitutional protections, he curiously ignores the relevant cases concerning contractual waiver or relinquishment of potential rights of speech and publication. These cases unequivocally refute appellant's theory, and hold that a knowing and voluntary waiver of potential First Amendment rights, by contract or otherwise, is enforceable and consistent with public policy.

The modern contours of the doctrine of contractual waiver of constitutional rights were set forth by the Supreme Court in *D.H. Overmeyer* v. *Frick Co.*, 405 U.S. 174 (1972). *Overmeyer* involved a contractual provision in which one of the parties waived notice and a hearing prior to the entry of a judgment in the event it defaulted on its payments. Applying the same standards as it had applied in the criminal context, *See, e.g., Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Patton* v. *United States*, 281 U.S. 276, 295, 297 (1930), the Supreme Court held that procedural due process rights could be waived and that Overmeyer had contractually waived its rights knowingly and intelligently.

The Supreme Court explicitly applied the *Overmeyer* rule to a contractual waiver of First Amendment rights in *Snepp* v. *United States*, 444 U.S. 507 (1980). Snepp, a former CIA agent, had violated his contract with the Agency not to publish unclassified information about the agency or its activities without first submitting the proposed publication to the CIA for review and possible editing. The Supreme Court upheld the

contractual waiver of Snepp's rights, and held that the equitable remedies of injunction and imposition of a constructive trust were proper and necessary to enforce the contract.

Similarly, in the recent case of *Cohen* v. *Cowles Medica Company*, ___U.S.___, 111 S.Ct. 2513 (1991), the Supreme Court held that a newspaper's breach of a promise of confidentiality to a news source, by publishing a newsworthy article identifying the source, was actionable on a state law promissory estoppel cause of action. In rejecting the newspaper's claim that the state law cause of action was barred by the First Amendment, the Court held:

> [G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. . . .
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> * * *
>
> . . . Minnesota law simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information are self-imposed.

111 S.Ct. at 2518-19.

Snepp has been followed by courts in California and other jurisdictions which have upheld contractual waivers of potential First Amendment rights. Thus, in *In re Steinberg* (1983) 148 Cal. App. 3d 14, 195 Cal. Rptr. 613, this Court enforced a film maker's contractual partial waiver of his First Amendment rights by agreeing to submit the final version of his documentary film on the justice system to the Superior Court for review and editing. This Court explicitly relied on the decisions in *Snepp* and *United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972), in reaching its conclusion:

> The prior restraints on publication in these cases [*Snepp* and *Marchetti*] were therefore upheld since the government had a contractual right to impose such a restraint.

148 Cal. App. 3d at 20, 195 Cal. Rptr. at 617.

A similar result was reached in *ITT Telecom Products Corp.* v. *Dooley* (1989) 214 Cal.App.3d 307, 262 Cal.Rptr. 773. There, the plaintiff brought an action for damages against its former employee claiming the employee had violated contractual and other duties of confidentiality by disclosing trade secrets in the course of litigation. The court held that the litigation privilege of disclosure did not apply where such disclosure violated a contract of confidentiality. In so holding, the court, relying on *Steinberg*, stated, " . . . it is possible to waive even First Amendment free speech rights by contract." *Id.* at 319, 780.

A similar result was recently reached by a New York appellate court in the precise context of a waiver of First Amendment rights by a settlement agreement. *Trump* v. *Trump*, 179 A.D. 2d 201, 582 N.Y.S.2d 1008 (1st Dept. 1992), appeal dismissed, 80 N.Y.2d 892, 587 N.Y.S.2d 907 (1992), leave to appeal denied, 80 N.Y.2d 760, 591 N.Y.S.2d 138 (1992). In that case, pursuant to a settlement agreement ratifying a prenuptial agreement, Mrs. Trump had agreed not to disclose or publish any information about Mr. Trump or the failed marriage of the parties. The trial court nevertheless *sua sponte* excluded the applicable provision. The Appellate Division reversed, on the basis of the strong policy favoring enforcement of settlements reached by the parties. The Appellate Division, relying on *Snepp*, held that the non-disclosure provision "does not, on its face, offend public policy as a prior restraint on protected speech." 582 N.Y.S.2d at 1011.[13/]

[13/] *Trump* is consistent with well-established authority in New York. As stated by New York's Court of Appeals (that State's highest court):

(continued...)

The same outcome has been reached by federal appellate courts. In *Erie Telecommunications, Inc.* v. *City of Erie, Pa.*, 853 F.2d 1084 (3rd Cir. 1988), the Third Circuit upheld terms of a settlement agreement by which a cable television operator had waived constitutional objections to the agreement. The court engaged in a lengthy review of the doctrine of waiver of constitutional rights, including First Amendment, due process, and equal protection rights, 853 F.2d at 1094, 1101, and concluded that no public policy doctrine prohibits waiver of such rights. *Id.* at 1099. *See, also, Soecon Industries* v. *American Stockman Tag Company*, 713 F.2d 1174 (5th Cir. 1983); *NCH Corporation* v. *Shane Corp.*, 757 F.2d 1540 (5th Cir. 1985).

Appellant nowhere addresses cases such as *Overmeyer, Snepp, Steinberg, ITT Telecom, Trump,* or *Erie Telecommunications*. His First Amendment and equal protection arguments are phrased as if the restrictions upon Armstrong were imposed *sua sponte* by the State or the courts, rather than agreed to by Armstrong, as part of a contract pursuant to which Armstrong received $800,000.[14/] While the Superior Court could not enjoin

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[13/](...continued)

> We have repeatedly held that, unless public policy is affronted, parties to a civil dispute are free to chart their own litigation course. . . . They "may fashion the basis uponwhich a particular controversy may be resolved" . . . and in doing so "[t]hey may stipulate away statutory,and even constitutional rights. . . ."

Mitchell v. *New York Hospital*, 61 N.Y.2d 208, 214, 473 N.Y.S.2d 148, 151 (1984) (citations omitted). *See also Abramovich* v. *Board of Education*, 46 N.Y.2d 450, 456, 414 N.Y.S.2d 109, 112 (1979) (waiver of due process right to a hearing); *Sonenberg* v. *Fuller*, 114 A.D.2d 677, 494 N.Y.S.2d 249, 250 (3rd Dept. 1985) (waiver of due process and equal protection rights).

[14/] Appellant does cite to *dicta* in *In re Halkin*, 598 F.2d 176, 190 (D.C. Cir. 1979), stating that enforcement of agreements not to disclose information "implicat[es] First Amendment rights." Brief for Appellant at 21. Whatever "implications" the court envisioned are unclear. (continued...)

Armstrong in the absence of the contract, it was well within the wise exercise of its discretion to do so on the basis of the settlement agreement.

D. The Superior Court Did Not Abuse its Discretion in Rejecting Armstrong's Argument that the Settlement Agreement Is Unenforceable Because there Purportedly is No Mutuality of Obligation

Armstrong's argument that the settlement agreement lacks mutuality of obligation is absurd, and the Superior Court did not abuse its discretion in giving the argument the short shrift it deserved.

It is, of course, hornbook law that a valid contract requires mutual consideration. "If the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation.'" *Restatement (Second) of Contracts*, § 79(c). The settlement agreement at issue here contained substantial consideration on both sides. Each side *mutually* waived and released the other from claims, although the Church did reserve its claims against Armstrong with respect to a single case then pending in the Court of Appeal. Armstrong, but not the Church, agreed to certain non-disclosure and non-assistance clauses, including paragraph 7G, upon which is based the preliminary injunction at issue here. The Church paid Armstrong $800,000. Armstrong, of course, paid the Church nothing.

Armstrong now attempts to argue that the provisions of the agreement pursuant to which he alone agreed to do or refrain from doing certain acts are invalid

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[14]/(...continued)
What is clear is that the First Amendment analysis of *Halkin* was rejected by the United States Supreme Court in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 25, 28-29, 32 (1984), as was recognized by this Court in *Coalition Against Police Abuse* v. *Superior Court* (1985) 170 Cal. App. 3d 888, 900, 216 Cal. Rptr. 614, 621.

because they are not mutual, but not the provisions by which the Church alone agreed to perform certain acts, namely, the payment of nearly one million dollars. The proposition, if accepted, would repeal centuries of contract law. If A agrees to buy Blackacre from B for $100, B is not required to buy Whiteacre from A for $100, or any other sum. The mutual considerations are "Blackacre" and "$100." Here, the mutual considerations were, on the Church's side, the release of claims plus $800,000, and, on Armstrong's side, the release of claims plus the promises to perform or refrain from performing certain acts, including the non-assistance clause. The agreement met all conceivable requirements of consideration and mutuality of obligation.

E. The Superior Court Did Not Abuse its Discretion in Finding that the Record Does Not Support Armstrong's Claim that He "Had No Freedom of Consent"

The Superior Court held that the "record shows that [Armstrong] was substantially compensated as an aspect of the agreement, and does not persuasively support [his] claim of duress . . ." (1716). "The question of duress . . . is a factual question; the existence of duress always turns on the circumstances." *Philippine Exports* v. *Chuidian* (1990) 218 Cal.App. 3d 1058, 1078, 267 Cal.Rptr. 457, 467. Accordingly, particularly on an appeal from a preliminary injunction order, it is not the role of the appellate court to decide such matters in the first instance or to undo the deliberations of the Superior Court, unless it can be shown that the lower court "exceeded the bounds of reason or contravened the uncontradicted evidence." *Continental Baking Co.* v. *Katz*, *supra*, 67 Cal. Rptr. at 770.

In this case, there was ample evidence in the record to support the Superior Court's preliminary determination. Armstrong was represented by several counsel, who had been in long and bitter litigation against the Church. Armstrong acknowledges (Brief for

Appellant 10-11) that the settlement agreement was the subject of lengthy negotiations, and that it was fully explained to and understood by him. And the actual signing of the document was videotaped in the presence of his counsel as a precaution precisely to demonstrate that the agreement was entered into knowingly and voluntarily.

Armstrong makes no allegation that *the Church* subjected him to duress. Rather, his complaint is lodged exclusively at his former attorney and at other litigants who urged him to settle his claims. Armstrong cites no authority, and there is none, holding that a party may set aside a settlement agreement because his attorney strongly urged him to settle, let alone where that party received close to one million dollars.

Indeed, the fact that Armstrong accepted, retained and continues to retain the benefit of his bargain precludes him from seeking to set aside the settlement agreement. Under California law, even where an agreement is the product of duress, coercion, undue influence or fraud, it is voidable, not void. Cal. Civ. Code §§ 1566, 1567.[15/] This distinction means that the allegedly wronged party, in this case Armstrong, must act in a timely and affirmative manner to rescind the voidable contract. The allegedly wronged party

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[15/] Cal. Civ. Code § 1566 states:

> A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties, in the manner prescribed by the Chapter on Rescission.

Section 1567 states:

> An apparent consent is not real or free when obtained through:
>
> 1. Duress;
> 2. Menace;
> 3. Fraud;
> 4. Undue influence; or,
> 5. Mistake.

can also ratify a voidable contract by his or her subsequent conduct, as Armstrong has done in this case. Cal. Civ. Code § 1588.

Only in rare situations where fraud or duress goes to the inception or execution of the agreement, so that the promisor is deceived as to the very nature of his act, and actually does not intend to enter into a contract at all, would California law hold a contract void. *1 Witkin, Summary of California Law,* Contracts, §§ 405, 617 (Ninth Ed. 1987). Thus, for example, in *Meyer* v. *Hass* (1899), 126 Cal. 560, 583, 58 P. 1042, a plaintiff, who could not read English, signed a release relying on the representation of his agent, who also acted as agent for the adverse party, that the instrument actually was a receipt. The court held the release void.[16/]

[16/] The *Restatement of Contracts* (Second) §§ 174-175 makes this distinction clear. Section 174 provides:

> If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.

The *Restatement* gives the following example of this "relatively rare situation[]": B refuses to sign a contract. "A grasps B's hand and compels B to physical force to write his name. B's signature is not effective as a manifestation of his assent, and there is no contract." Armstrong did not alleged any facts showing that this sort of force or duress occurred here.

Restatement § 175(1) describes the sort of duress that renders a contract voidable:

> If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

Comment b to § 175(1) states that, to render a contract voidable, there must have been threats which "arouse such fear as precludes a party from exercising free will and judgment or that [are] such as would induce assent on the part of a brave man or a man of ordinary firmness."

(continued...)

The evidence in the record here unequivocally demonstrates that even if Armstrong's claims of lack of consent are credited, which the Superior Court refused to do, the release agreements were voidable, and not absolutely void. As we have seen, Armstrong concedes that he was well aware of the nature of the agreement be signed. See Brief for Appellant at 10-11.

This means that even if Armstrong could somehow convince a trier of fact that he did not consent to the releases, the agreement would still be entirely valid because he did not rescind it, retained the consideration he received in exchange for it and otherwise ratified it by his subsequent conduct.

Nowhere in the trial court did Armstrong even allege that he rescinded the agreement or restored the consideration. Instead, the record shows that he ratified the agreement. As a matter of law, Armstrong's continued acceptance and enjoyment of the benefits of the transaction, well beyond the time he signed the agreement, as a matter of law constitutes consent to and ratification of all the obligations of the agreement, including the non-assistance provisions. Cal. Civ. Code § 1589. *See, E.g., Union Pacific R. Co.* v. *Zimmer*, (1948) 87 Cal.App.2d 524, 197 P.2d 363.

Under California law, a settlement agreement may not be rescinded partially. *E.g., Larsen* v. *Johannes,* (1970) 7 Cal.App.3d 491, 503 86 Cal.Rptr. 744, 751. Armstrong retained consideration he received from the Church but attempts to avoid the effect of his own undertakings in the same agreement. California courts have rejected this type of self-serving approach:

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[16]/(...continued)

As this *Restatement* analysis shows, Armstrong's settlement agreement was, at most, voidable and not void.

> [I]t is axiomatic that . . . the entitled party must rescind the entire contract and may not retain the rights under it which he deems desirable and repudiate the remainder. The rationale underlying the rule is that retention of only the benefits constitutes unjust enrichment and binds the parties to terms not contemplated within the agreement.

IMO Development Corp. v. *Dow Corning* (1982), 135 Cal.App.3d 451, 458, 185 Cal.Rptr. 341, 345.

The record shows that Armstrong never rescinded his settlement agreement with the Church, has not restored the benefits he received, and instead has ratified the agreement. In these circumstances, the trial court did not abuse its discretion in granting a preliminary injunction.

F. The Superior Court Did Not Abuse its Discretion in Rejecting Armstrong's Frivolous "Restraint of Trade" Argument

Despite the fact that the preliminary injunction explicitly permits Armstrong to "engag[e] in gainful employment rendering clerical or paralegal services not contrary to the terms and conditions of this order" (1715), *i.e.,* by all means other than assisting litigation opponents of the Church, Armstrong claims that the injunction constitutes an unlawful restraint of trade because it bars him from working as a paralegal on Scientology cases. Armstrong's argument overlooks the well-established principle that a contract that bars one from pursuing only a limited part of a business, trade or profession does not fall within the prohibitions of Business & Professions Code Section 16600.

Boughton v. *Socony Mobil Oil Company, Inc.* (1965) 231 Cal.App.2d 188, 192, 41 Cal.Rptr. 714, 716, is dispositive of the issue Armstrong raises. In *Boughton,* plaintiffs, owners of real property, sued to have the court invalidate as a restraint of trade a restriction

in their deed, which prohibited the dispensing of petroleum products on their property. *Boughton, supra*, 231 Cal. App. 2d at 190, 41 Cal.Rptr. at 714-715.

In rejecting this argument, the *Boughton* court stated:

> . . . [W]hile the cases are uniform in refusing to enforce a contract wherein one is restrained from pursuing an *entire* business, trade or profession, as falling within the ambit of section 16600 [citations omitted], where one is barred from pursuing only a *small or limited part* of business, trade or profession, the contract has been upheld as valid.

Id. at 192, 716 (emphasis added.)

Applying this principle, the *Boughton* court concluded that, because the plaintiffs were not prohibited from carrying on the lawful business of selling petroleum products or operating a service station but were barred from doing so only on a particular piece of property, the covenant was *not* an unlawful restraint on trade and thus was valid. *Id.* at 716. *See, also, King* v. *Gerold* (1952) 240 P.2d 710.

The holdings of *Boughton* and *King* are controlling here. The preliminary injunction prohibits Armstrong in effect from pursuing only a limited portion of the trade or business of being a paralegal, *i.e.*, working on cases that involve the Church.

III. The Terms of the Injunction are Clear and Enforceable

The Superior Court was careful to delineate, in terms as precise as permitted by the English language, what Armstrong may do or not do under the terms of the injunction. Armstrong may not voluntarily assist a non-governmental party in litigating or arbitrating a claim against the Church, or in preparing to litigate or arbitrate such a claim. He may assist such a party in other respects, *i.e.*, in respects other than "regarding such claim." Likewise, he may accept subpoenas and testify, and he is under no obligation to engage in "physical resistance, obstructive tactics, or flight" to avoid service of subpoenas.

He may engage in employment as a paralegal, so long as he does not assist with respect to actual or potential litigation or arbitration claims against the Church. And, of course, he may report criminal activity to the appropriate authorities.

Armstrong nevertheless claims that the injunction is "fraught with uncertainty", and conjures up a variety of marginal and insignificant acts which he claims may or may not be covered by the injunction.

Armstrong raises the specter of problems that he himself has generated by his own violation of the settlement agreement. After receiving nearly a million dollars from the Church in 1986, he decided to start a new career as a paralegal and work for two of the small handful of attorneys who regularly litigate against the Church. Thus, Armstrong accepted employment with Joseph Yanny and Ford Greene precisely to assist in litigation against the Church, in direct violation of the settlement agreement. All of the supposedly perplexing conundrums that Armstrong faces, *e.g.* whether "licking a stamp' or "answering the phone" violates the injunction, are questions that would not need to be asked had Armstrong not decided to seek "employment" in the very matters from which he had agreed to abstain. All of Armstrong's alleged complexities and vaguenesses arise from the simple fact that Armstrong has breached the settlement agreement.[17/]

[17/] Under Armstrong's reasoning, if Armstrong had signed an agreement prohibiting him from coming within 100 yards of his former spouse, and then moved into the apartment next door to her, the court would be precluded from enforcing the injunction because it would require "protracted supervision" from the court. Similarly Armstrong would claim impermissible vagueness on the grounds that he was unable to discern exactly when his former spouse was 100 yards away from him due since the intervening walls of the apartment blocked his view. Obviously, the difficulties stem from Armstrong's actions, not the court's.

Thus, it is not the settlement agreement or the injunction which is vague or indefinite. If any confusion exists, it is only because Armstrong works for Ford Greene, who makes a practice of litigating against the Church.[18/] Working in the office of Greene, Armstrong quire understandably has difficulty avoiding Scientology litigation. The problematic situation stems, however, from Armstrong's choice of employers, not from the language of the injunction.

Nor is the enjoining of such employment an overbroad restriction. It is hard to imagine a narrower or more limited field of endeavor than that which Armstrong undertakes: anti-Scientology litigation.

Armstrong's reliance on several cases to support the proposition that the injunction is unenforceable is misplaced. For example, *Long Beach Drug Co.* v. *United Drug Co.* (1939) 13 Cal.2d 158, 88 P.2d 698, dealt with affirmative covenants of the defendant to sell to the plaintiff a sufficient supply of drug products to meet the demands of the retail trade. The court noted that courts of equity traditionally will not decree specific performance of contracts which by their terms require a succession of acts whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction. Similarly, *Hunter* v. *Superior Court*, (1939) 36 Cal.App.2d 100, 97 P.2d 492, and *Whipple Road Quarry Co.* v. *L.C. Smith Co.*, (1952) 114

[18/] Appellant's argument that the injunction precludes *Greene* from representing the Aznarans or other litigation opponents of the Church is belied by the specific terms of the injunction, which permit Greene to undertake such representation when retained *by others* (1715). Greene is only precluded from representing others if he is retained *by Armstrong* to do so.

Cal.App. 2d 214, 249 P.2d 854, are inapposite because they dealt with affirmative covenants.[19/] The instant case, of course, deals with negative covenants, which courts traditionally enforce. See 6 Witkin, *California Procedure*, Provisional Remedies § 263, p. 225 (1985).

CONCLUSION

For the reasons stated herein and in the order of the Superior Court, the order granting the preliminary injunction should be affirmed.

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[19/] Armstrong also cites *Lind* v. *Baker* (1941) 48 Cal.App.2d 234, 119 P.2d 806, in which the defendant raised a laches argument after the plaintiff waited three years to enforce specific performance of a mining claim. *Lind* is inapposite to the case at bar which raises no laches issue.

CERTIFICATE OF SERVICE

I, ERIC M. LIEBERMAN, hereby certify that on this 20th day of April, 1993 I caused the Brief for Respondent to be served on the following counsel for the parties, by causing a true copy thereof to be mailed first class postage prepaid in sealed envelopes, addressed as follows:

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